(2)

No. 04-1033

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT CLEAR CHANNEL COMMUNICATIONS, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Communications Commission's changes in the local radio ownership rules, leading to a substantial reduction in the number of local radio stations that may be owned and transferred, violate Section 202 of the Telecommunications Act of 1996 by administratively repealing Congress's decision to dramatically deregulate media ownership rules and expand permissible common ownership.

RULE 29.6 DISCLOSURE

Clear Channel Communications, Inc. is a publicly held company. Clear Channel Communications, Inc. has no parent company. No publicly owned company owns more than ten percent of its stock.

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INTRODUCTION

Pursuant to Rule 12.6 of the Rules of this Court, respondent Clear Channel Communications, Inc. ("Clear Channel") submits this response in support of the Petition for a Writ of Certiorari filed by the National Association of Broadcasters ("NAB"). *See* Petition for a Writ of Certiorari of the NAB, No. 04-1033 (filed Jan. 31, 2005) ("NAB Pet.").

The Federal Communications Commission's ("FCC's" or "Commission's") changes to the local radio ownership rules, which led to a substantial reduction in the number of radio stations that may be owned and transferred, violate Section 202 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"), by administratively repealing Congress's decision to dramatically deregulate media ownership rules and to increase permissible levels of common ownership. Of particular concern to Clear Channel are the FCC's unlawful alterations to the local radio ownership rules regarding attributable interests and the transferability of station groups that exceed the new ownership limits.

This case, which involves the structure of the media marketplace in the United States, presents questions of great national importance. The Third Circuit's affirmance of the FCC's action countenances an unprecedented administrative arrogation of power, reaches a result directly at odds with Congress's unmistakably plain deregulatory purpose in the 1996 Act in general and Section 202(h) of that Act in particular, and conflicts with the decisions of the D.C. Circuit. Accordingly, NAB's Petition for a Writ of Certiorari should be granted.

STATEMENT OF THE CASE

I. Legal and Factual Background

A. The Telecommunications Act of 1996

As this Court has observed, the 1996 Act was an "unusually important legislative enactment." *Reno v. ACLU*, 521 U.S. 844, 857 (1997). "[I]ts primary purpose was to reduce regulation" in order to "promote competition in . . . the market for over-the-air broadcasting." *Id.*; *see Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 502-03 n.20 (2002) (noting the "deregulatory and competitive purposes of the [1996] Act"); S. Rep. No. 104-23, at 1 (1995) (stating that Congress intended to create a "pro-competitive, de-regulatory, national policy framework"). In Section 202 of the 1996 Act, in particular, "Congress set in motion a process to deregulate the structure of the broadcast . . . industr[y]." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033, *reh'g granted on other grounds*, 293 F.3d 537 (D.C. Cir. 2002).

To that end, Section 202 effected landmark changes in the rules governing ownership of broadcast media outlets, moving across the board to lift entirely or to loosen then-existing federal regulations that limited media ownership rights. *See* 1996 Act § 202(a) (eliminating national radio station ownership cap); *id.* § 202(b) (increasing numerical limits for local radio station ownership and eliminating audience share limitation); *id.* § 202(c) (repealing national television station ownership cap, increasing national audience reach limitation, and ordering rulemaking on local ownership limits); *id.* § 202(d) (relaxing one-to-a-market rule); *id.* § 202(e) (easing dual network ownership restrictions); *id.* § 202(f) (abolishing cable-broadcast cross-ownership restriction).

With respect to local radio ownership, Section 202(b) required the FCC to raise its limits on the number of stations that an entity could own in a specific market and to eliminate certain other restrictions. Previously, the Commission had prohibited common ownership of any more than four stations, even in the largest markets, and superimposed on that cap a presumption that any combination resulting in an audience share higher than 25% would contravene the public interest. *See Revision of Radio Rules & Policies*, 7 F.C.C.R. 6387, 6393, 6406 (1992) ("*1992 Radio Order*"). The 1996 Act uniformly expanded those multiple ownership rights by precluding the FCC from setting common ownership limits any more restrictive than: eight stations in markets with forty-five or more stations, with five or fewer in the same service (AM or FM), 1996 Act § 202(b)(1)(A); seven stations in markets with thirty to forty-four stations, with four or fewer in the same service, *id.* § 202(b)(1)(B); six stations in markets with fifteen to twenty-nine stations, with four or fewer in the same service, *id.* § 202(b)(1)(C); and five stations in markets with fourteen or fewer stations, with three or fewer in the same service, provided that no single entity could own more than fifty percent of the stations in such market, *id.* § 202(b)(1)(D). Congress also authorized the Commission to further relax these new limitations in order to permit greater common ownership if such ownership "will result in an increase in the number of radio broadcast stations in operation." *Id.* § 202(b)(2).

At the time that Congress took these historic steps, the FCC defined a radio market as the geographic area covered by the mutually overlapping contours of the stations proposed for common ownership. *See* 47 C.F.R. § 73.3555(a)(1) (1995); *Revision of Radio Rules & Policies*, 9 F.C.C.R. 7183, 7189 (1994) ("*1994 Radio Order*"); *1992 Radio Order*,

7 F.C.C.R. at 6395.[1] The Commission also had in place rules regarding the types of relationships that it considered to be "attributable" – or that would "count" towards the total number of stations that a party could own – for purposes of its local radio ownership rules. *See* 47 C.F.R. § 73.3555(a) (1995); *id.* § 73.3555 note 2.

Nothing in Section 202 suggests that Congress meant to change these foundational rules for determining permissible ownership levels. Indeed, the legislative history of the 1996 Act affirmatively makes clear that the statute did not alter the FCC's method of "attributing ownership" and that Congress did not "envision" the Commission making such changes itself. H.R. Rep. No. 104-204, at 118 (1995).

Section 202(h) is the coda to the dramatic, consistently deregulatory movements of Section 202 discussed above. That subsection mandates that the Commission review its broadcast ownership rules every two (now every four) years[2] "as part of its regulatory reform review," and that it "shall determine whether any of such rules are necessary in the public interest as a result of competition" and "shall repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act § 202(h). As the D.C. Circuit correctly perceived, Section 202(h) plainly was meant to

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1. In reaffirming the wisdom of this definition in the 1990s, the FCC had expressly rejected arguments that local radio markets should be defined purely by reference to geographic areas, finding that a contour-overlap approach provides "a more accurate measure of where a station's signal can be adequately received and, therefore, where [the station] can compete for listeners." *1994 Radio Order*, 9 F.C.C.R. at 7189; *see 1992 Radio Order*, 7 F.C.C.R. at 6395.

2. In 2004, Congress amended Section 202(h) to require such review on a quadrennial, as opposed to biennial, basis. *See* Consolidated Appropriations Act, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004).

"continue the process of deregulation" that the rest of Section 202 – and indeed, the entire 1996 Act – commenced. *Fox*, 280 F.3d at 1033; *see Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002).

B. The FCC's Radio-Related Rulemakings Following Passage of the 1996 Act

Immediately following passage of the 1996 Act, the FCC amended its radio regulations as mandated by Section 202(b), leaving intact the traditional contour-overlap market definition. *See Implementation of Sections 202(a) & 202(b)(1) of the Telecomms. Act of 1996*, 11 F.C.C.R. 12368 (1996). The Commission implemented Section 202(b) without notice and comment, recognizing that the statute prohibited "any discretionary action on the part of the Commission." *Id.* at 12371.

A few years later, in its first broadcast biennial review, the newly populated FCC bemoaned the effects of the deregulation mandated by Section 202(b) and indicated that it would initiate a rulemaking to change the definition of radio markets. *See 1998 Biennial Regulatory Review—Review of the Commission's Broad. Ownership Rules*, 15 F.C.C.R. 11058, 11087-91 (2000). Several Commissioners saw this strategy for what it was: an improper means of purposefully evading Congress's mandate to allow more common ownership in radio. As then-Commissioner Powell explained in the resultant rulemaking, the "effect of eliminating the Commission's current methodology and replacing it with a commercially defined market (such as Arbitron) would be to shrink markets, and thereby substantially limit the number of stations one could own." *Definition of Radio Markets*, 15 F.C.C.R. 25077, 25100 (2000) (Concurring Statement of Commissioner Powell). He cautioned that the FCC should not "us[e] the rulemaking

process as a means to circumvent specific statutory provisions and effectuate a different result than Congress intended." *Id.*; *see id.* at 25096 (Separate Statement of Commissioner Susan Ness) (expressing concern that "whatever definition we adopt should be consistent with the intent of Congress . . . in relaxing radio ownership restrictions"); *id.* at 25099 (Separate Statement of Commissioner Harold Furchtgott-Roth) (warning that the FCC should not manipulate the "definition of 'markets' in order to cut back on the concentration levels that Congress expressly set").

The Commission eventually consolidated that radio-related rulemaking with another proceeding concerning the local radio ownership rules. *See Rules & Policies Concerning Multiple Ownership of Radio Broad. Stations in Local Markets*, 16 F.C.C.R. 19861 (2001) ("*Local Radio Ownership NPRM*"). Although the FCC in 1996 read Section 202(b) as affording it no discretion *at all* to change the numerical ownership limits, the *Local Radio Ownership NPRM* asked whether the Commission's "public interest" authority permitted it to set limits *lower* than those established by statute. *Id.* at 19871-85. The FCC then rolled that entire consolidated proceeding into the 2002 broadcast biennial review, *see 2002 Biennial Regulatory Review—Review of the Commission's Broad. Ownership Rules*, 17 F.C.C.R. 18503, 18506 (2002) ("*Omnibus NPRM*"), which produced the Commission decision at issue here, *2002 Biennial Regulatory Review—Review of the Commission's Broad. Ownership Rules*, 18 F.C.C.R. 13620 (2003) ("*Order*") (MG Pet. 206a-658a).[3]

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3. This response cites to the appendix filed by Media General, Inc. in No. 04-1020, which concerns the same Third Circuit decision at issue here. *See* Petition for a Writ of Certiorari of Media General, Inc., No. 04-1020, at 1a-723a (filed Jan. 28, 2005). The Media General appendix is cited herein as "MG Pet. __a."

II. The Proceedings Below

A. The FCC's Biennial Review Order

1. The Governing Legal Standard

The FCC acknowledged in the *Order* that Section 202(h) requires it to determine whether its rules remain "necessary in the public interest." *Order* ¶ 11 (MG Pet. 215a). To establish the legal standard governing that review, the Commission expressly cross-referenced its decision in the contemporaneous biennial review of the FCC's telecommunications (as opposed to broadcast ownership) regulations under Section 11 of the Communications Act. *Id.* ¶ 11 n.15 (MG Pet. 215a) (citing *2002 Biennial Regulatory Review*, 18 F.C.C.R. 4726, 4730 (2003) ("*Section 11 Report*")). That statute, which was added to the Communications Act by the 1996 Act, contains the same "necessary in the public interest" language as Section 202(h). 47 U.S.C. § 161(a)(2).

In its *Section 11 Report*, the Commission interpreted the "necessary in the public interest" standard to embody nothing more than the ordinary public interest test that applies when the Commission "adopt[s] a rule in the first instance." 18 F.C.C.R. at 4730. The FCC claimed that there was "no evidence that Congress intended to impose a new or higher standard for what is 'necessary in the public interest' for purposes of" the biennial review. *Id.* The Commission attempted to justify this conclusion largely on the basis of judicial constructions of the term "necessary," as used in other statutes, to mean "useful," "convenient," or "appropriate." *Id.* at 4731.

2. Changes to the Local Radio Ownership Rules

As explained in NAB's Petition, the Commission's *Order* also radically altered the manner in which the FCC defines local radio markets, switching from a contour-overlap approach to a geographic market definition system utilizing data provided by Arbitron, a commercial ratings service. *See* NAB Pet. 3-8. The undeniable result of this change is to reduce the level of permissible common ownership of local radio stations below the levels that Congress specifically set in the 1996 Act. *See id.* at 7-8.

In another move that was clearly designed to (and indisputably does) limit the number of radio stations that a party may own in a local market, the FCC made two changes to its attribution rules. *First*, despite its conclusion just two years earlier that joint sales agreements ("JSAs")[4] should not be attributable, *see Review of the Commission's Regulations Governing Attribution of Broad. and Cable/MDS Interests*, 14 F.C.C.R. 12559, 12612-13 (1999), the Commission abruptly reversed course, concluding, without explanation, that "JSAs may convey sufficient influence or control over advertising to be considered attributable," *Order* ¶ 322 (MG Pet. 427a).

Second, the Commission increased the categories of local marketing agreements ("LMAs") that are considered to be attributable.[5] The shift in market definition from a contour-

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4. A JSA typically authorizes a broker to sell advertising time for a station in return for a fee paid to the station. *Order* ¶ 316 (MG Pet. 422a).

5. An LMA allows a broker to produce or to supply a portion of the station's programming, often in return for a fee, and "typically provide[s] that the broker may sell advertising time and retain the advertising revenue for the programming it provides to the brokered (Cont'd)

overlap approach to the Arbitron standard further expanded the number of LMAs (as well as owned stations) that are attributable in a given market. *Order* ¶ 280 (MG Pet. 395a-97a). In addition, the Commission increased the number of LMAs that would be attributable to a party. The FCC decided to count any station (either owned or covered by an LMA, including domestic and foreign stations) that is declared "home" to an Arbitron metro market as reported by BIA.[6] *Order* ¶ 280 & nn.592-93 (MG Pet. 395a-97a & nn. 592-93). The FCC also decided to count any licensed full power radio station whose "community of license" (as defined by the FCC) is located within an Arbitron metro market. *Id.*

The FCC further restricted the activities of local radio group owners by drastically constraining their ability to transfer station combinations that had been assembled in full compliance with the FCC's pre-existing ownership regulations. With respect to owned stations, the Commission grandfathered existing groups of commonly owned stations that would exceed the limits of the new rules, but only so long as the present owner did not seek to transfer the combination. *Id.* ¶ 484 (MG Pet. 539a-541a). The FCC conclusorily stated that it would prohibit the transfer of combinations that violate the modified local radio ownership rule at the time of sale, subject to a limited exception for sales to "eligible entities." *Id.* ¶¶ 488-89 (MG Pet. 544a-45a). The Commission defined "eligible entities" as companies with $6 million or less in annual revenue.

(Cont'd)

station." *Id.* ¶ 319 n.693 (MG Pet. 424a n.693). Prior to the issuance of the *Order*, only those LMAs with stations having principal community contour overlap with an owned station were attributable. 47 C.F.R. § 73.3555(a)(2)(i) (1995).

6. BIA is a commercial service that provides research and analysis regarding the media industry. *See* www.bia.com (visited Feb. 7, 2005).

Id. ¶ 489 (MG Pet. 545a-46a). Only such entities may acquire non-compliant combinations, transfer them to other "eligible entities," and sell them to non-"eligible entities" after holding them for at least three years. *Id.* ¶ 490 (MG Pet. 546a-47a).

With respect to combinations rendered unlawful due to the existence of newly attributable JSAs and LMAs, the FCC gave licensees a mere two years from the effective date of the *Order* either to terminate agreements that do not comply with the modified local radio ownership rules, or otherwise to come into compliance with the new rules. *Id.* ¶¶ 325, 491 (MG Pet. 428a-29a, 547a). The Commission, moreover, refused to allow *any* transfers of non-compliant combinations that included newly attributable sales and programming agreements, even within the two-year period. *Id.*

B. The Third Circuit's Decision

A number of parties filed petitions for review of the *Order* in the Second, Third, Ninth, and D.C. Circuits, pursuant to the Hobbs Act, 28 U.S.C. § 2341, *et seq.* *See* MG Pet. 10a-11a. For its part, Clear Channel, which along with the majority of petitioners filed for review in the D.C. Circuit, argued that the Commission's decision to change its radio ownership rules in such a way as to *increase* the limitations on common ownership of radio stations in local markets – particularly insofar as it decided to attribute additional sales and marketing agreements and restricted transfers of grandfathered combinations – violated Congress's command in Section 202(h) that the FCC adopt only *deregulatory* changes in the biennial review. Other petitioners, including NAB, advanced similar arguments relating to the overtly regulatory character of the *Order* with respect to the local radio ownership rules and, in particular, the alterations that the FCC made to the market definition standard.

At the outset of the litigation, the Third Circuit stayed the implementation of the *Order*. *See id.* 194a-196a. The Third Circuit then denied a motion to transfer venue to the D.C. Circuit, despite the fact that the D.C. Circuit had issued the two decisions that originally remanded certain of the broadcast ownership rules for the reconsideration undertaken in the *Order*. *See id.* at 197a-205a; *see also* NAB Pet. 12; *see generally Fox*, 280 F.3d 1027; *Sinclair*, 284 F.3d 148. On the merits, the Third Circuit affirmed the FCC's contention that Section 202(h) imposes no new or different standard of review upon the agency's determination whether to retain or modify existing rules, and upheld the FCC's decision to increase regulatory burdens on radio station owners by its changes to the local radio rules.

With respect to the legal standard governing the biennial review under Section 202(h), the Third Circuit in one breath acknowledged the statute's undeniably "deregulatory" purpose, MG Pet. 34a, but in the next deprived it of any deregulatory effect whatsoever. The Court of Appeals found that all the FCC must do in the biennial review is to "determine whether its then-extant rules remain useful in the public interest" under the *same* public interest test that applies in ordinary rulemakings; only if the rules fail that lenient test must the agency make any changes. *Id.* at 35a; *see id.* at 26a-36a. In reaching this conclusion, the Third Circuit rejected arguments that Congress's admittedly deregulatory intent must be given proper force. Inexplicably, the court below found that the "repeal or modify" language in Section 202(h) authorizes the FCC to adopt "more stringent regulation" in the context of the biennial review so long as it determines that "the public interest calls for" such re-regulation. *Id.* at 34a. The Third Circuit pinned Congress's deregulatory purpose to the purely procedural obligation of the Commission "periodically to justify its existing regulations" and found that Congress placed no other constraints on the FCC's authority in the biennial review. *Id.*

With respect to the substantive radio rules, the Third Circuit rebuffed arguments that the specific levels of common ownership that Congress set in Section 202(b) of the 1996 Act, combined with Section 202(h)'s deregulatory mandate, precluded the FCC from shifting the definition of local radio markets so as to reduce the permissible levels of common ownership below those that Congress set. MG Pet. 85a-90a; *see* NAB Pet. 13-14. Similarly, the court below upheld the Commission's decision to increase the number of stations that count towards the ownership limits, thus effectively decreasing the permitted levels of common ownership even farther, by attributing additional sales and marketing agreements. MG Pet. 96a-99a; *see* NAB Pet. 14. Finally, the Third Circuit affirmed the FCC's decision to severely limit group owners' ability to transfer station combinations acquired in full compliance with the Commission's previous rules, despite the Court of Appeals' acknowledgment that this change, too, increases rather than decreases regulatory burdens. MG Pet. 91a-96a; *see* NAB Pet. 14.

When it handed down its opinion, the Third Circuit continued its stay of all of the ownership rules. *See* MG Pet. 107a. Subsequently, the Court of Appeals lifted the stay only as to the implementation of the concededly re-regulatory changes to the local radio ownership rules. *See id.* at 193a. Accordingly, the radio industry today is subject to ownership limits that are *more restrictive* than those deliberately selected by Congress in the 1996 Act, which Congress authorized the FCC, going forward, only to *loosen*. *See* NAB Pet. 15.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision not only guts the FCC's biennial review of broadcast ownership rules of any deregulatory force, but also transforms that review into a recurring opportunity for re-regulation of the broadcast industry. This is plainly not what Congress intended when it enacted Section 202(h). The decision below frustrates the clear deregulatory purpose that Congress sought to advance in Section 202 and threatens the ability of group owners, as well as the American public, to enjoy the benefits of efficiency that Congress recognized would result from increased levels of common ownership.

This Court's review is warranted because the Third Circuit's decision will have lasting adverse effects on the nation's radio industry and the listening public, sanctions the FCC's illegitimate effort to circumvent Congress's considered judgment to permit higher levels of common radio station ownership, and conflicts with the decisions of the D.C. Circuit regarding the proper scope of the Commission's biennial review duties under the 1996 Act.

I. This Case Presents Questions of Critical Importance Relating to the Structure of the Nation's Media Marketplace.

This case concerns one of the most significant duties that Congress assigned to the Commission in the 1996 Act – the biennial review required by Section 202(h). This case also relates to one of the FCC's key areas of responsibility – the ownership of our nation's mass media outlets. *See* NAB Pet. 15-16.

As explained by NAB, this Court has found that the 1996 Act was "an unusually important legislative enactment," *id.* at 16 (quoting *Reno v. ACLU*, 521 U.S. at 857), and has

thus granted *certiorari* to review a significant number of cases arising out of the FCC's implementation of that law, *id.* (citing *Verizon v. FCC*, 535 U.S. 467; *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999)); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, No. 04-277 (oral argument scheduled for Mar. 29, 2005) (reviewing FCC's decision to classify cable modem service as an "information service" pursuant to the 1996 Act); *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004) (reviewing FCC's decision regarding petition for preemption filed pursuant to the 1996 Act); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (reviewing FCC's decision implementing the pole attachment provisions of the 1996 Act).[7]

As a testament to the national importance of the structure of the country's media marketplace, this Court has also frequently reviewed FCC decisions relating to media ownership rules, even in the absence of a circuit split. *See* NAB Pet. 17 (citing *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978); *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956); *Metro Broad., Inc. v. FCC*, 497

7. In addition to these cases specifically involving, as here, FCC actions implementing the 1996 Act, this Court has reviewed many cases arising under the 1996 Act generally. *See City of Rancho Palos Verdes v. Abrams*, No. 03-1601 (argued Jan. 19, 2005) (reviewing case arising under Section 332 of the Communications Act, as amended by the 1996 Act); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (addressing question whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under the antitrust laws); *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635 (2002) (deciding question whether the federal district courts have jurisdiction over a telecommunication carrier's claim that the order of a state utility commission requiring reciprocal compensation for telephone calls to Internet Service Providers violates the 1996 Act); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (resolving constitutionality of Section 505 of the 1996 Act).

U.S. 547 (1990); *CBS, Inc. v. FCC*, 453 U.S. 367, 371 (1981); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 360 (1955); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940)). The Third Circuit's decision, which has nationwide effect under the Hobbs Act, *see* 28 U.S.C. §§ 2112(a), 2342,[8] poses questions of equal significance to those presented in these cases and is just as worthy of this Court's review, *see* NAB Pet. 16-17.

First, the Third Circuit's affirmance of the FCC's decision regarding the proper interpretation of Section 202(h) affects not just this particular proceeding on remand, but will as a practical matter govern all future periodic reviews of the FCC's media ownership rules. The decision below eviscerates the deregulatory purpose of the broadcast-related provisions of the 1996 Act by announcing a legal standard under which the Commission is free to make its rules – including those that Congress required the FCC to relax in other parts of Section 202 – yet more restrictive through future review proceedings under Section 202(h). In so doing, the Third Circuit's decision opens the door for the FCC to further cut back on the permissible levels of common ownership that Congress expressly set – and directed the Commission only to raise, not to lower – in the 1996 Act. Thus, the biennial review, which Congress established as a means of accomplishing additional deregulation over time, has been transformed into a recurring opportunity for re-regulation of the broadcast industry.[9]

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8. Even apart from the nationwide effect of the decision under the Hobbs Act, the panel's express retention of jurisdiction over the FCC's action on remand ensures that the Third Circuit will necessarily review the Commission's further determinations with respect to the *Order*. *See* MG Pet. 107a.

9. Moreover, because of the Third Circuit's heavy reliance on the FCC's decision relating to the proper interpretation of Section

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Second, the Third Circuit's affirmance of the rule changes adopted in the *Order* will have dramatic effects on the radio industry and radio listeners across the country. When Congress directed the FCC to raise the local radio ownership limits, it found that "[i]ncreased multiple ownership opportunities w[ould] allow radio operators to obtain efficiencies," 141 Cong. Rec. S8424, S8424 (daily ed. June 15, 1995) (remarks of Sen. Burns), that were necessary to permit radio to "grow strong and well into the next century," 141 Cong. Rec. S8061, S8076 (daily ed. June 9, 1995) (remarks of Sen. Pressler). The Commission itself, both in the *Order* and in previous decisions, has acknowledged the efficiencies and concomitant public interest benefits that flow from increased levels of common ownership. *See Order* ¶ 236 (MG Pet. 368a) (stating that as a result of the "greater consolidation of radio stations in local and national markets" permitted by the 1996 Act, "the radio industry today is on a stronger financial footing than it was a decade ago"); *1992 Radio Order*, 7 F.C.C.R. at 6393-94 (concluding that increased levels of common ownership would bring "considerable public benefit[s]" to American radio listeners); *see also* NAB Pet. 17-18 (providing additional citations). The changes to the local radio ownership rules made by the FCC and affirmed by the Third Circuit, however, threaten to deprive group owners of the efficiencies that Congress meant to promote and will prevent American radio listeners from enjoying the recognized public interest benefits that flow from those efficiencies.

The effect of all this on the broadcast industry, as NAB correctly observes, is harsh. NAB Pet. 17-18. For example, the Third Circuit itself admitted that, under the Commission's

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11 of the Communications Act, *see* MG Pet. 28a-33a, it is highly likely that the decision below will infect the standard applied to the Commission's periodic review of non-broadcast rules as well.

revised market definition rules, "there would be an average [of] 47.5% fewer stations" in thirty-three markets of various sizes that were studied. MG Pet. 91a n.65; *see id.* at 91a (acknowledging that "the change to Arbitron Metro markets operates as a net decrease in most markets' size"). The specific impact of the market definition change on Clear Channel bears this out. The number of stations that Clear Channel may own in markets where it already owns stations was reduced, due to the new market definition rule, by 203. What is more, as a result of the shift in market definition, the number of stations that Clear Channel may own decreased in 125 of the Arbitron metro markets in which it owns stations (or 43.7% of the relevant markets) and increased in none.

With respect to the Third Circuit's affirmance of the Commission's decision to count additional sales and marketing agreements towards the local radio ownership limits, the adverse consequences for radio owners are just as real. Here, too, the Third Circuit acknowledged that this change was "an anti-deregulatory modification," MG Pet. 97a n.74, and indeed it is. At the time the FCC's *Order* was issued, Clear Channel had sales or marketing agreements with fourteen stations across the country that were rendered non-compliant by the changes in the market definition and/or attribution rules.[10]

More importantly, sales and marketing agreements are often necessary in order to keep a station profitable or to prevent it from going dark. For example, Clear Channel currently sells advertising time pursuant to a JSA on WVVV in Williamstown, West Virginia. That station is located in a market that is ranked number 243 out of the 287 markets

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10. Clear Channel has since terminated its relationships with several parties with which it had JSAs and LMAs, based on the impending deadline to dissolve such contractual arrangements.

tracked by Arbitron (with number 1 being the largest and number 287 being the smallest).[11] The licensee provides high-quality programming for the station but lacks the ability to sell advertising time, due to the difficulty of recruiting professional salespeople. Under the rules affirmed by the Third Circuit, the newly attributable JSA with WVVV causes Clear Channel now to exceed the applicable ownership limit. Clear Channel thus must terminate the agreement within two years. The dissolution of the JSA, in turn, will require the licensee of WVVV to establish a sales staff, a task that will be exceedingly difficult if not impossible to achieve, and certainly costly. Even assuming that WVVV can acquire necessary sales personnel, it will be unable to continue to provide the present level of high-quality programming because of the need to divert resources towards advertising sales efforts. And if it cannot obtain a sales staff, the station faces the very real prospect of being forced to go dark, thereby eliminating an independent source of news and entertainment programming from the Williamstown media market.

As for transferability, the Third Circuit itself expressly recognized that the Commission's decision "depresses the price of the station combinations as a whole, which deprives combination-owners (as sellers) of their expected investments." *Id.* at 93a; *see id.* at 91a-93a; *see also* NAB Pet. 14. Clear Channel, like other group owners, has invested hundreds of millions of dollars to create station clusters that are capable of providing the efficiencies and public interest benefits produced by common ownership. The FCC's drastic limitation on transferability upheld by the Third Circuit renders that investment substantially less valuable. And this effect is not limited to just a few markets – the new rules

11. Market rankings contained herein are current as of December 30, 2004, and were obtained from the BIA Financial Media Access Pro Database, the same source that the FCC utilizes.

place Clear Channel over the ownership limits in 46 markets of varying sizes across the country.

The regulatory "exception" that would allow the transfer of non-compliant combinations to "eligible entities" does nothing to soften the severity of the transferability restriction, as the panel below implicitly conceded. *See* MG Pet. 94a (stating that "[t]he number of times the exception is invoked is irrelevant," strongly suggesting the court's recognition that the exception will rarely if ever be applied). This is because, as a practical matter, companies with $6 million or less in annual revenue are unlikely ever to obtain the level of financing needed to acquire the radio combinations at issue. In fact, many of the clusters subject to forced breakup under the *Order* are valued at amounts far beyond the reach of "eligible entities." Even single-station transactions in mid-sized markets often far exceed the annual revenue of these entities. *See, e.g.*, *Deals*, Broadcasting & Cable, Dec. 13, 2004, at 40 (single FM station in Jacksonville, Florida, the 50th ranked Arbitron metro market, sold for $7.75 million). Station groups in small to mid-sized markets sell for significantly higher amounts. *See, e.g.*, *Deals*, Broadcasting & Cable, Jan. 24, 2005, at 72 (combination of one FM station and one AM station in Hagerstown, Maryland, the 169th ranked Arbitron metro market, sold for $18 million); *id.* (combination of two FM stations in Fresno, California, the 68th ranked Arbitron metro market, sold for $25 million). The values of these transactions do not even begin to approach the values of a large number of the combinations that must be disaggregated at the time of sale, particularly those in higher-ranked markets. *See, e.g.*, Tony Sanders, *Max Media Re-Enters Norfolk with Barnstable Buy*, Billboard Radio Monitor, Jan. 27, 2005, *at* http://www.billboardradio monitor.com/radiomonitor/search/article_display.jsp?vnu_ content_id=1000778527 (combination of four FM stations

and one AM station in Norfolk, Virginia, the 40th ranked Arbitron metro market, sold for $80 million).

II. The Third Circuit's Decision Is Inconsistent with the Telecommunications Act of 1996 and Not Only Disregards but Affirmatively Frustrates Congress's Plainly Deregulatory Purpose.

While the Third Circuit paid lip service to the "plainly deregulatory" purpose of the 1996 Act in general and Section 202(h) in particular, MG Pet. 34a, its decision allows the FCC to conduct the biennial review of broadcast ownership rules in a manner directly at odds with Congress's clearly stated intention. The Commission itself has previously confirmed that "[a]dding rules, as opposed to modifying or eliminating existing rules, is clearly beyond the immediate task" in the biennial review. *Section 11 Report*, 18 F.C.C.R. at 4729; *see 2000 Biennial Regulatory Review*, 16 F.C.C.R. 1207, 1213 (2001); *see also* NAB Pet. 23. But the Third Circuit wholeheartedly endorsed the FCC's authority to do just that, finding that the Commission is free in the biennial review to adopt "more stringent regulation" as long as it "reasonably determines that the public interest" will thereby be served. MG Pet. 34a.

The only purported textual basis for the Third Circuit's decision is the term "modify" in Section 202(h)'s directive that the FCC "repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act § 202(h); MG Pet. 34a. But the term "modify" cannot be interpreted in a vacuum. It is a "fundamental canon of statutory construction that the words of a statute must be read . . . with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks and citation omitted). Moreover, statutory language must be interpreted against "the backdrop

of what Congress was attempting to accomplish." *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990).

Here, the Third Circuit's interpretation of Section 202(h), which expressly permits the FCC to increase regulatory burdens during the biennial review, MG Pet. 34a, does violence to Congress's purpose in passing the 1996 Act – "to promote competition and *reduce regulation*," H.R. Rep. No. 104-204, preamble (1995) (emphasis added); *see, e.g.*, S. Rep. No. 104-23, at 1 (1995) (Congress meant to provide a "pro-competitive, *de-regulatory*, national policy framework") (emphasis added); *see also* NAB Pet. 22-24; Petition for a Writ of Certiorari of the Newspaper Ass'n of America, No. 04-1045, at 19-20 (filed Jan. 31, 2005) ("NAA Pet.").

It also conflicts with the text and structure of Section 202 as a whole. Section 202(b) required the Commission to relax its local ownership limits, based on the recognition that increased multiple ownership opportunities would allow radio station operators to achieve efficiencies that would ultimately benefit the public. *See supra* pp. 2-5, 16; *see also* NAB Pet. 20. Nearly all of Section 202's other subsections likewise dramatically reduced federal media regulation, either by eliminating or substantially loosening prior limitations on ownership rights. *See supra* pp. 2-4. Section 202(h) is the coda to these consistently deregulatory movements of Section 202, and its meaning is necessarily informed by that relationship. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (explaining "the doctrine of *noscitur a sociis*" ("a word is known by the company it keeps") as a "rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words"). Reading Section 202(h) to permit the FCC not only to undo the deregulatory changes that Congress spelled out in the 1996 Act but to impose even greater restrictions on regulated entities than existed in 1996 turns the entire statute inside out.

The legislative history of Section 202 makes even more clear that Congress did not intend for the Commission to undercut the 1996 Act by changing its method of calculating compliance with the radio ownership limits set forth in Section 202(b). As noted above, at the time the 1996 Act was adopted, the FCC had in place well-established rules governing market definition and attribution. *See supra* pp. 3-4. Congress explicitly stated its assumption that the FCC would *not* change its "current methodology of calculating or attributing ownership" in a manner that would "impede the objectives" of the 1996 Act. H.R. Rep. No. 104-204, at 119 (1995). Even absent this type of specific guidance in the legislative history, it is axiomatic that when Congress enacts a statute against the background of settled judicial and administrative interpretation, courts must presume that Congress was aware of the earlier interpretations and, in effect, adopted them in formulating the statute. *See Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *see also* NAB Pet. 20-21.

The Third Circuit purported to ground the admittedly deregulatory effect of Section 202(h) in the requirement that the Commission "periodically . . . justify its existing regulations." MG Pet. 34a. The Court of Appeals concluded that this was "an obligation [the FCC] would not otherwise have." *Id.* As a matter of substantive administrative law, this is simply inaccurate. Under this Court's settled precedents, "[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy." *Am. Trucking Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967); *see NBC v. United*

States, 319 U.S. 190, 225 (1943) (holding that the Commission cannot retain a rule if "time and changing circumstances reveal that the 'public interest' is not served by application of the Regulation[ ]"); *see also* NAB Pet. 25 (citing additional sources); NAA Pet. 22 (same). Congress must have intended to impose on the FCC *some* standard of review beyond that which already applies under the Administrative Procedure Act, *see United States v. Menasche*, 348 U.S. 528, 538-39 (1955), but the Third Circuit's interpretation of Section 202(h) as requiring nothing more than generic "public interest" review renders the provision mere surplusage.[12] If the Court of Appeals meant to say that the purely mechanical requirement of initiating the review process every number of years somehow fulfills the deregulatory purpose of Section 202(h), that is nonsensical. The Third Circuit's holding on the scope of the agency's authority in the biennial review transforms that review from

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12. In addition, the Third Circuit substituted the term "useful" for the statutory term "necessary" in its articulation of the legal standard under Section 202(h). *Compare* MG Pet. 35a (explaining that "the Commission is required to determine whether its then-extant rules remain *useful* in the public interest") (emphasis added) *with* 1996 Act § 202(h) (providing that "[t]he Commission . . . shall determine whether [its ownership] rules are *necessary* in the public interest") (emphasis added). Regardless of the precise meaning of the term "necessary" in Section 202(h), *see* MG Pet. 28a-33a, judges plainly have no business rewriting Congressional enactments to include terms that are different from those that the legislature deliberately selected, *see, e.g.*, *United States v. Locke*, 471 U.S. 84, 95 (1985) ("[C]ourts [do not have] *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. 'There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.' ") (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

a regular opportunity for further deregulation into a recurring re-regulatory nightmare.

III. The Third Circuit's Decision Conflicts with the D.C. Circuit's Decisions Regarding the FCC's Biennial Review Duties.

Prior to the Third Circuit's decision, the D.C. Circuit decided two cases dealing with Section 202(h) and one case involving Section 11 of the Communications Act, 47 U.S.C. § 161, the closely related provision governing the biennial review of telecommunications regulations. In each of those cases, the D.C. Circuit gave proper effect to Congress's clearly deregulatory purpose, interpreting the relevant statutory provision in a manner that makes clear that the Commission's biennial review duties extend beyond its ordinary obligation to ensure that its regulations serve the public interest. The Third Circuit's decision, which renders Section 202(h) a dead letter, stands in stark contrast with these decisions of the D.C. Circuit.

In *Fox*, for example, the D.C. Circuit reversed the Commission's decision in the 1998 broadcast biennial review to retain intact the 35% cap on national television station ownership. *Fox*, 280 F.3d at 1040-45. The D.C. Circuit found that Congress in Section 202 had "set in motion a process to deregulate the structure of the broadcast and cable television industries," and that Section 202(h) required the FCC to "continue" that process. *Id.* at 1033; *see* NAB Pet. 22; NAA Pet. 19; Petition for a Writ of Certiorari of Tribune Co., No. 04-1036, at 24 (filed Jan. 28, 2005) ("Tribune Pet."). In *Sinclair*, the D.C. Circuit struck down the Commission's decision to retain the "eight voices" component of its local television ownership rule and, as it had in *Fox*, found that

"Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules." *Sinclair*, 284 F.3d at 159 (quoting *Fox*, 280 F.3d at 1048); *see* NAB Pet. 22-23; NAA Pet. 20; Tribune Pet. 24-26.

As discussed above, the Third Circuit's interpretation fails to give any independent effect to Congress's deregulatory purpose and, to the contrary, clears the way for the FCC to increase regulatory burdens on broadcasters in the biennial review. *See supra* pp. 20-24. This is plainly inconsistent with the D.C. Circuit's rulings in *Fox* and *Sinclair*. In addition, the *Order* (in the one aspect of the FCC's decision that *was* faithful in some sense to Congress's deregulatory aim) interpreted the D.C. Circuit's cases regarding the deregulatory presumption established by Section 202(h) to "upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." *Order* ¶ 11 (MG Pet. 215a). In reversing this portion of the *Order*, the Third Circuit expressly disagreed with the D.C. Circuit, concluding that its sister circuit's interpretation had "misguided" the Commission into believing that the biennial review imposed any independent obligation upon it at all. MG Pet. 34a-35a.

In *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004), the D.C. Circuit interpreted Section 11. The Third Circuit purported to rely upon the D.C. Circuit's opinion in *Cellco* to support its interpretation of Section 202(h), *see* MG Pet. 30a-33a, but the decision below actually conflicts with *Cellco*. In *Cellco*, the D.C. Circuit went to great lengths to stress the "deregulatory purpose" of the biennial review provision. *Cellco*, 357 F.3d at 97; *see* NAA Pet. 20-21. The Third Circuit, as discussed above, arrived at an interpretation of Section 202(h) that not only fails to give any effect whatsoever to that purpose but affirmatively

frustrates it. *See supra* pp. 20-24. Moreover, the D.C. Circuit confirmed that the biennial review imposes obligations that "extend[] *beyond* [the Commission's] normal monitoring responsibilities." *Cellco*, 357 F.3d at 99 (emphasis added). The Third Circuit, by contrast, held that Section 202(h) imposes obligations on the Commission that are identical to those that already apply under traditional principles of administrative law. *See supra* pp. 22-23. Finally, *Cellco* expressly extended to Section 11 the "presumption in favor of repealing or modifying covered rules" that the D.C. Circuit had found inherent in Section 202(h). *Cellco*, 357 F.3d at 97; *see* NAA Pet. 20-21. In concluding that *Cellco* "clarifi[ed]" the D.C. Circuit's rulings on the presumption in such a way as to render the FCC's reliance on the existence of such a presumption "misguided," MG Pet. 34a, the Third Circuit reached a result that cannot be squared with *Cellco* itself.[13]

In sum, the Third Circuit's construction of Section 202(h) is fundamentally irreconcilable with the D.C. Circuit's interpretation of the biennial review provisions of the 1996 Act. The Third Circuit refused to effectuate Congress's plain deregulatory intent in the 1996 Act and substituted its own judgment for that of Congress by approving an FCC decision that re-regulates local radio ownership limits to levels that Congress previously and expressly found to be too high. The D.C. Circuit, however, has given the biennial review

13. The D.C. Circuit also had previously construed Section 10 of the Communications Act, 47 U.S.C. § 160, under which the FCC in forbearance proceedings must inquire whether its rules remain "necessary" to further a particular goal, to mandate an inquiry into whether rules are "required to achieve a desired goal" and to oblige the agency to demonstrate "the existence of a strong connection" between its regulation and the goal it seeks to accomplish. *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 510, 512 (D.C. Cir. 2003); *see* NAA Pet. 21 n.14. The Third Circuit's interpretation of the statutory term "necessary" is in tension with this decision as well.

provisions at least some deregulatory bite and has certainly not authorized re-regulation in the context of the biennial review. This Court's review is needed to establish consistency among the courts of appeal that may review the FCC's future periodic review decisions, and to prevent the Third Circuit's decision from perpetuating a regime under which the Commission is free to reverse the deregulatory measures that Congress in the 1996 Act unambiguously ordered the FCC to implement.

CONCLUSION

For the forgoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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